Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Level 3 Communications, LLC Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253	Docket No. WC 09-153

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

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SUMMARY

The typical Section 253 case involves claims that local regulatory requirements include public obligations that are so burdensome as to unlawfully prevent entry. One of the assumptions underlying these claims is that the initial entry onto the underlying property is essential to the provision of service (presumably because there is no alternative property that could be used).

However, local governments also own a large number of buildings, structures, poles, rights-of-way where commercial considerations are the focus. Such facilities may not be generally open for public access. There may be private alternatives available to those who might wish to use such facilities or property. The facilities include broadband conduit and fiber that the government may use for its own purposes or lease to others. The facilities or property may be leased or made available at commercial rates, after negotiation. This case includes that sort of lease.

Section 253 serves a very important role, but it has no application in the context of contracts for such facilities or property. Section 253 bars state and local governments from picking winners and losers in the telecommunications market by adopting statutes, regulations, or legal requirements similar to statutes and regulations, that "prohibit" or "effectively prohibit" a telecommunications provider's ability to provide service. 47 U.S.C. § 253(a). Section 253 does not empower the courts or the FCC to pick and choose among winning and losing *contractual terms* in complex market transactions in which state and local governments are involved. Preemption applies where government is acting as a regulator, not as a market participant, as the Commission has recognized. Indeed, allowing Level 3 to selectively challenge parts of its complex contractual relationship with the New York State Thruway Authority ("NYSTA") would have a serious and adverse impact on broadband deployment by state or local

governments by making every contract regarding broadband sharing or deployment subject to Section 253 challenge.

NATOA urges the Federal Communications Commission ("FCC" or "Commission") to deny the Petition and to reject Level 3's efforts to transform Section 253 of the Communications Act, 47 U.S.C. § 253, into an escape clause from commercial contracts – particularly contracts that were entered into beginning more than a decade ago.

Even if Section 253 were to apply, the Petition should be dismissed on the merits under existing precedent, and because the FCC lacks jurisdiction to resolve disputes under Section 253(c). In the unlikely event the Commission were to find it necessary to reach the merits, the Commission should find that the pleadings do not permit it to rule in favor of Level 3. At the very least, a contested hearing would be required before the case could be resolved in Level 3's favor. That is because Level 3 has not shown that it has been prohibited or effectively prohibited from providing any service under the tests announced by this Commission, but has based its Section 253(a) claim on hypotheticals and supposition.

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The National Association of Telecommunications Officers and Advisors ("NATOA"), through its undersigned counsel, hereby files these comments in opposition to the petition ("Petition") filed by Level 3 Communications, LLC ("Level 3").

NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer cable franchising and telecommunications policy for the nation's local governments. These governments hold and manage various forms of property. For example, these governments hold ordinary streets and sidewalks in trust for transit and for other uses. While government has a proprietary interest in that property, access is often limited to entities that are willing to undertake public obligations in conformity with regulatory requirements. An ordinance establishing conditions that an applicant for a cable franchise must satisfy often reflect that regulatory concern. The typical Section 253 case involves claims that local regulatory requirements include public obligations that are so burdensome as to unlawfully prevent entry. One of the assumptions underlying these claims is that the initial entry onto the underlying property is essential to the provision of service (presumably because there is no alternative property that could be used).

However, local governments also own a large number of buildings, structures, poles, rights-of-way where commercial considerations are the focus. Such facilities may not be generally open for public access. There may be private alternatives available to those who might wish to use such facilities or property. The facilities include broadband conduit and fiber that the government may use for its own purposes or lease to others. The facilities or property may be leased or made available at commercial rates, after negotiation. This case includes that sort of lease.

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BACKGROUND

While NYSTA will describe the facts in detail in its response, NATOA will emphasize a few points.

Level 3, through its predecessor, voluntarily entered into a complex commercial transaction with the NYSTA that, from Level 3's perspective, contained terms both bitter and sweet. Level 3 now asks the FCC to use Section 253 to preempt the terms it does not like, while NYSTA would remain bound by the terms that Level 3 prefers. As discussed below, such a request falls far outside Section 253's domain.

In 1995, well before the FCC began to contemplate a national broadband plan, the NYSTA took steps to establish fiber optic infrastructure stretching across its entire highway system. Recognizing that such a project required special expertise, NYSTA did not undertake the project alone. It contracted with Adesta Communications, Inc. (then known as MFS Network Technologies, Inc.) to construct and install such facilities.[1]

Adesta entered into agreements with users who paid for the right to use and install fibers in the network ("Users") subject to the limitations in the contract with NYSTA. NYSTA collected a percentage of these fees. The contract between Users and Adesta, which NYSTA reserved the right to review, identified a number of locations where a User could connect to the conduit and fiber.[2] In the initial user agreement, NYSTA did not agree to permit additional points of connection to the network. There are at least two obvious reasons for such a limitation. The Thruway is a limited access road that receives federal highway funding. Additional access points create a risk for the structure and the safety of the highway; additional access points may require the Thruway to go through the effort of obtaining federal approvals. 23 C.F.R. §§ 645.209(c), 645.215(d). In addition, an agreement for additional access points would have carried with it additional rights of access to property, and to the network itself. Agreeing to additional access would have resulted in additional cuts into facilities in which NYSTA had an identifiable future interest, as the ultimate owner of the network.[3] Hence, additional access points were only to be provided if agreement could be reached on the terms and conditions for extending the additional connections.

Level 3's predecessor-in-interest, Williams Communications, Inc. ("Williams"), was one User with whom Adesta contracted. In 1999, Williams entered into a contract for the rights to access and use the longitudinal rights-of-way and the network that burdens the rights-of-way at designated points. Shortly thereafter, Williams sought additional access points. Only a little

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[1] Petition Exh. 6.

[2] *See* Petition Exh. 7, Art. 2, Item 1 b (referring to access points as set forth in Exhibit A thereto).

[3] *See* Petition Exh. 6 at Art. 9.

more than a year after entering into the original contract, Williams agreed to the Riders that are the focus of the Level 3 Petition.[4] The Riders established an agreed price for additional access points.[5] Comparable Riders, providing for a similar price, had been negotiated with Adesta by other providers, as NYSTA has explained.

Adesta later filed for bankruptcy, and NYSTA assumed ownership over the conduit and some of the fiber in the network. NYSTA now not only owns the underlying rights-of-way; it also owns the network previously owned by Adesta.

The commercial arrangement between NYSTA, Adesta, and Users, is complicated, but two key components of the deal should be noted. On the front end of the deal, Users received access to NYSTA's rights-of-ways and the backbone network at what appears to be a very favorable price. On the back end, NYSTA reserved the right to charge additional fees if Users sought to expand facilities in NYSTA property beyond the network's original footprint.

Level 3's deal reflects these two components. Level 3 obtained its initial access to ducts running the span of the NYSTA system for a remarkable bargain. Paying a fee of $31,256,796, Level 3 obtained access to and use of some *520 miles* of duct and NYSTA rights-of-way over a *twenty (20) year* term. This amounts to about $60,000 per mile. NATOA's studies suggest that installing fiber and conduit independently costs between $95,000 - $200,000 a mile, without even considering the ongoing fiber and conduit maintenance costs, and the rental cost of the underlying property.[6] As noted, this deal was based on a contract that provided for specific entry

[4] Petition Exhibits 15-34.

[5] While Level 3 claims these deals were somehow forced upon it, it provides no evidence of the claim, and the claim is incredible given the timeline here.

[6] NATOA *ex parte* notice dated Sept. 17, 2009, GN 09-51, attaching "Brief Engineering Assessment: Efficiencies Available Through Simultaneous Construction And Co-Location Of Communications Conduit And Fiber," Columbia Telecommunications Corporation, August, 2009.

and exit points. On the back-end of the deal, NYSTA preserved its right to obtain additional compensation if Level 3 sought to further expand its facilities in NYSTA property. *See, e.g.*, Petition Exh. 7 Art. 2 Item 1 ("MFSNT will use reasonable efforts to allow USER to expand its facilities in any regeneration site . . . PROVIDED that the underlying property owner consents to such expansion."). When Williams sought to expand the facilities in this way, it entered into agreements with NYSTA and Adesta that allowed it to do so, but that also recognized the value of these additional access points.

Level 3 does not claim that the overall arrangement is prohibitory. Level 3 now asks the FCC to preempt the consideration that NYSTA is owed in these existing contracts, and to bar NYSTA from collecting such payments in the future. *See* Petition at 34 (urging the FCC to find that "rent provisions of the Riders are and have been preempted, and are and were invalid"). But Level 3 implicitly asks the FCC to bind the NYSTA to the other terms, essentially creating a contract without consideration, and altering the underlying benefits and burdens of the original contract.

I. SECTION 253 DOES NOT APPLY TO THIS TRANSACTION.

A. By Its Terms, Section 253 Has an Important But Limited Purpose.

Section 253(a) is narrowly focused on statutes, regulations, or legal requirements similar to statutes and regulations that "prohibit" or "have the effect of prohibiting" the ability to provide service:[7]

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of

[7] While the term "legal requirements" is not defined, "When general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *See generally*, Sutherland Statutory Construction (6th Ed. 2000), §§ 47.16, 47.17. p. 273-74.

> any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a). Congress enacted Section 253 to uproot state and local regulatory systems that preserved telephone monopolies:

> Congress apparently feared that some states and municipalities might prefer to maintain monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service. § 253(a) takes that choice away from them, thus preventing state and local governments from standing in the way of Congress' new free market vision.

Cablevision of Boston, Inc. v. Pub. Improvement Comm'n, 184 F.3d 88, 97-98 (1st Cir. 1999); *see also Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part) ("Congress ended the States' longstanding practice of granting and maintaining local exchange monopolies."). In other words, Section 253 scope is limited: it reaches regulatory and legislative actions, and cannot be interpreted more broadly consistent with Constitutional principles.[8]

B. Section 253 Does Not Preempt State or Local Governments Acting as Market Participants.

While the Riders that Level 3 targets are attached to permits, it is clear that the right that was sought and obtained nearly a decade ago was not merely the right to cross State lands but to make new connections to and within state-owned property. That is, the Riders are part of what is first and foremost a complex commercial transaction, where the NYSTA contracted with Users like Williams to allow access to the longitudinal right-of-way and the network that burdens that right-of-way. NYSTA appears to be acting as a market participant in a classic sense. The Level

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[8] Congressional intent to preempt must be "absolutely certain" and "unmistakably clear." *Gregory v. Ashcroft*, 501 US 452, 464 (1991). Statutes that preempt must be read narrowly. *Cipollone v. Liggett Group, Inc.*, 505 US 504, 516 (1992); *Medtronic, Inc. v. Lohr*, 518 US 470, 485 (1996). There is a duty "to accept the reading that disfavors preemption." *Bates v. Dow Agrosciences, LLC*, 125 S. Ct. 1788, 1801 (2005) (emphasis added); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008).

3 Petition itself makes clear that Level 3 targets contractual, not regulatory, terms. See, *e.g.*, Petition at 42.[9]

Reading Section 253 to reach government in its role as a market participant is inconsistent with the basic concept of preemption. Federal preemption under the Supremacy Clause ordinarily targets regulatory actions, not state or local government marketplace transactions. Applying the National Labor Relations Act ("NLRA"), for example, the Supreme Court recognized: "When a State owns and manages property, . . . it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation. Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.,* 507 U.S. 218, 227 (1993) (emphasis in original). The Court continued:

> When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant with no interest in setting policy.

Id. at 229.

The same principle applies under the Communications Act. *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) ("the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary

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[9] The contractual nature of the arrangement is also underscored by the relief that Level 3 seeks. Level 3 does not seek the same access that others using the NYSTA facilities have. It is seeking special, customized access rights that fundamentally alter the nature of the arrangement under which it initially gained access to the conduit. Section 253 deals with regulatory requirements, not demands for special private rights.

capacity.") Courts have asked two key questions to distinguish regulatory and proprietary actions:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999).

Consistent with the plain language of Section 253, this Commission has correctly found that Section 253 is ordinarily not implicated when a state or local government contracts with private parties as a market participant. In one case, the FCC found that a contract that barred a state from entering any other agreements for use of the rights-of-way *could possibly* run afoul of Section 253. *In re Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement To Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, 14 FCC Rcd. ¶ 21697 at 21707 ¶ 17 (1999).[10] But as the Wireline Competition Bureau later clarified, this principle only applies in limited circumstances. In *Minnesota*, the exclusive contract prevented the State from granting anyone other than the selected provider access to the rights-of-way, even if the State later determined that granting such access was in its interest. State or local government contracts that do not have a preclusive effect on third parties are not subject to Section 253 preemption. *In re Amigo.net*, 17 FCC Rcd. 10964, 10967-68 ¶ 8 (2002). The FCC has never found that a telecommunications provider may agree to a contract, and then claim *its own agreement* "prohibits" or "effectively prohibits" it

[10] The Commission did not find a violation of Section 253. It decided that the issue was complex enough that it could not decide whether granting exclusive access to the rights-of-way along a freeway did or did not violate Section 253. 14 FCC Rcd. at 21700 ¶ 4.

from providing service.[11] *Id.* ("[I]n order to violate section 253 an agreement must have an adverse impact on the ability of *another entity* to provide telecommunications for a fee directly to the public.") (emphasis added).

It follows that most state and local government proprietary actions are not subject to federal preemption under Section 253. *Qwest v. Portland*, 385 F.3d 1236, 1239 (9th Cir. 2004) ("Section 253(a) preempts *regulations*") (emphasis added). Under the Constitution, state and local government possess property rights just as private citizens do. *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984).[12] Accordingly, if a state or local government acts not primarily to regulate third-parties but to further its proprietary interests—particularly where (as here) there is no indication that the proprietary action is a furtive effort to pick winners and losers in the telecommunications market – Section 253 does not apply.

C. Section 253 Does Not Require Governments To Take Affirmative Steps To Make Property More Accessible, Nor Does It Authorize Regulation of Rates for Access to All Property.

That Section 253 does not apply becomes clearer when one considers what, precisely, Level 3 is asking the Commission to preempt. Level 3 does not identify a "statute" or a "regulation." It asks the Commission to preempt the negotiated price term in a Rider to a contract whose benefits it otherwise seeks to retain. The effect is to leave NYSTA contractually bound to provide access to land and facilities, without the agreed consideration (a violation of basic principles of contract). This is far different than what occurs if there is regulatory

[11] As discussed, *infra*, the riders to the occupancy permits that Level 3 challenges here, which allowed further expansion in the rights-of-way, were not exclusive. And what is more, NYSTA entered into the contracts not with a third party that would exclude Level 3, but *with Level 3* (or, more accurately if legally irrelevant, with Level 3's predecessor-in-interest). The contracts thus are the opposite of a "prohibition" – they are an authorization.

[12] If Section 253(a) were read broadly to apply to the exercise of property rights, it would preempt even the property rights of private citizens. Congress intended no such thing.

preemption: where a State is preempted, it can enact new regulations that conform to federal law. Here, there is nothing the NYSTA could do to protect its contractual interests – unless, of course, the Commission simply preempts the Rider altogether, in which case Level 3 would be limited to using the access points agreed to in the original contract.

Section 253 bars regulatory schemes that "prohibit" or "effectively prohibit" the ability of a telecommunications provider to offer services in the market. The statute does not require state and local governments to take affirmative steps to facilitate competitive entry. *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 105 (1st Cir. 1999) (finding that Congress intended Section 253(c) to impose a "negative restriction on local authorities' power to regulate" not "an affirmative obligation to enact regulations."). It follows that Section 253 cannot be read to compel the NYSTA to enter into contract amendments or abide by contracts on terms to which it has not agreed.

The limits on Section 253 are underscored by Section 224 of the Act, 47 U.S.C. § 224. The statute empowers the FCC to regulate the prices for pole attachments: "[T]he Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable. . . ". 47 U.S.C. § 224(b)(1). Section 224 also affirmatively opens utility property to third parties: "A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). But, critically, Section 224 does *not* apply to state or local governments. 47 U.S.C. § 224(a)(1) (defining "utility" to exclude any person owned by the federal government or any state).

Setting Federalism and constitutional issues aside, Congress might have drafted Section 253 to mandate access to all state or local government property and to dictate federal rental terms for its use. But Congress did no such thing. Section 253 neither mandates access to all State and local property, nor gives the FCC the power to regulate price terms. The legislative history reflects this:

> [W]e should be with out local city mayors, our local city councils, because we are for true Federalism, we are for returning power as close to the people as possible, and that is what the Stupak-Barton amendment does. It explicitly guarantees that cities and local governments have to right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way. It does not let the city governments prohibit entry of telecommunications services providers for pass through or for providing service to their communities. [but]. . . The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way. We should vote for localism and vote against any kind of federal price controls.

141 Cong Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Barton).[13] Level 3 is asking the Commission to extend its jurisdiction in a manner that is inconsistent with the Communications Act.

D. Applying Section 253 Here Would Deter Broadband Deployment By State and Local Governments.

Even if the Commission had jurisdiction to preempt the price terms, it should decline to do so, because applying Section 253 as Level 3 urges would deter broadband deployment by state and local governments.

NYSTA, like all thruway authorities, has significant communications needs, which will only increase with the advent of intelligent highway technologies. By building out fiber-based facilities in the rights-of-way, NYSTA not only serves these needs, but also provides a valuable, alternative resource to new market entrants that wish to use such networks instead of building and installing their own. As suggested, *infra*, these joint arrangements can significantly reduce the cost of entry.

[13] Congress adopted the Stupak-Barton amendment by a lopsided 338-86 margin. 141 Cong. Rec. H8477.

Applying Section 253 here would put an immediate halt to such projects. No state or local government can afford to enter into contracts to share communications facilities if the third party can do so with fingers crossed. The state or locality would face unlimited liability if a third party can selectively preempt terms of a deal, while leaving the public entity bound by others. The state or local government would have virtually no hope of securing funding in a deal fraught with such inherent uncertainty. What terms would be enforceable? What revenue streams could be secured? No one could say. The only rational course for a state or local government facing such liability would be to close facilities to third parties, or to avoid deploying such facilities at all.

The effect on broadband deployment is only magnified by Level 3's delay in bringing this action. That delay provides an independent basis for dismissing this case. If Level 3 or its predecessor had indeed been prohibited or effectively prohibited from providing service by the rental terms the company agreed to in 1999 and 2000, the company was free to attempt to challenge the terms at that time.[14] Level 3 would now face significant hurdles if it sought to challenge the terms of the 1999 and 2000 contracts in New York. N.Y. Civil Practice Law § 213(2) (establishing six (6) year statute of limitations for contact actions). The FCC should not provide an alternative forum for parties to telecommunications contracts to file late challenges.

Dismissal would be consistent with well-established principles of law. The defense of laches "requires proof of (1) lack of diligence by the party against whom the defense is asserted,

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[14] Level 3 maintains that Williams made a "business judgment" not to pursue litigation. Petition at 10. This is, in the first place, no excuse for delay. Having made that business judgment, and obtaining precisely the benefits it wanted to obtain, equity demands that Level 3 live with the consequences of its commercial choice. Second, the "business judgment" argument emphasizes that there is no prohibition here: the company thought about the terms, and decided that they did not unduly affect the business case for the facilities. If the company had truly found the terms prohibitory, one would have expected the company to commence its Section 253 claim *before* it agreed to such terms.

and (2) prejudice to the party asserting the defense." *Kansas v. Colorado,* 514 U.S. 673, 687 (1995) (quoting *Costello v. United States,* 365 U.S. 265, 282 (1961)). Level 3's lack of diligence is evident: the allegedly "prohibitory" contracts were entered into in 1999 and 2000. Level 3 offers no explanation that justifies its delay during the past 10 years, or its predecessor's choice to make the payments for a number of years. The prejudice to NYSTA is equally clear: NYSTA has allowed Level 3 to occupy its property throughout this period with the full expectation of receiving payment. During this time, NYSTA was deprived of the opportunity to lease the particular property in question to other parties, and other competitors were acting based on the state of the market. The FCC should not foment contractual uncertainty by allowing companies like Level 3 to take the benefits of a contract, and claim years later that it was "prohibited" in its ability to provide service.

II. EVEN IF SECTION 253 WERE TO APPLY, THE PETITION SHOULD BE DISMISSED.

A. The FCC Should Not Reach the Merits Because the Petition Implicates Section 253(c).

If Section 253 were applicable here, Section 253(c) would be critical to any decision on the merits. Level 3 admits this. Petition at 38. But because the FCC lacks jurisdiction to resolve Section 253(c) issues, the FCC should dismiss the Petition so that the case can be resolved in a single forum.

The FCC has not ruled on its authority to hear cases that raise Section 253(c) issues. TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253, CSR-4790, Memorandum Opinion and Order, 12 FCC Rcd. 21396 (1997),[15] reconsideration denied, 13 FCC Rcd. 16400 ¶ 43 (1998).

[15] Appendix C to this decision has an extended discussion of the Commission's authority to hear cases that involve Section 253(c) claims.

However, three circuit courts have discussed the issue, and uniformly concluded that Congress deliberately and expressly stripped the FCC of jurisdiction to decide issues arising under Section 253(c). *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1177 (11th Cir. 2001); *TCG Detroit v. City of Dearborn,* 206 F.3d 618 (6th Cir. 2000); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004). Those decisions are supported by clear legislative history. As Senator Feinstein explained, an earlier version of Section 253(d) would have empowered the FCC to resolve disputes under all subsections of the statute:

> The preemption gives any communications company the right, if they disagree with a law or regulation put forward by a State, county, or a city, to appeal that to the FCC. That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialist at the FCC, on what may be very broad questions of State or local government rights. . . . If the preemption provision remains, a city would be forced to challenge the FCC ruling to gain a fair hearing in Federal court. This is important because presently they can go directly to their local Federal court. Under the preemption, a city, State, or county government would have to come to the Federal court in Washington after an appeal to the FCC. A city appealing an adverse ruling by the FCC would appear before the D.C. Federal Appeals Court rather than in the Federal district court of the locality involved. Further, the Federal court will evaluate a very different legal question—whether the FCC abused their discretion in reaching its determination. The preemption will force small cities to defend themselves in Washington, and many will be just unable to afford the cost. By contrast, if no preemption exists, the cable company may challenge the city or State action directly in the locality and the court will review whether the city or State acted reasonably under the circumstances. . . .

141 Cong. Rec. S8170-71 (daily ed. June 12, 1995). Accordingly, Senator Feinstein proposed striking subsection (d) in its entirety. *Id.* As a compromise, Senator Gorton urged retaining subsection (d), but revising it to extend FCC jurisdiction only to subsections (a) and (b), not subsection (c). *Id.* at S8306. When Senator Feinstein's amendment was voted down, Senator Gorton's amendment was adopted by unanimous consent. *Id.* at S8308. Consequently, Congress deliberately removed the FCC's ability to resolve disputes under Section 253(c), a choice the statute expressly reflects:

> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates *subsection (a) or (b)*, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253(d) (emphasis added). The Commission cannot resolve the 253(c) issues that are at the heart of the case. Should the FCC decide that a claim may be raised under Section 253, the FCC should decline to reach the merits on jurisdictional grounds.[16]

B. The Petition Fails To Show a Section 253 Violation Under Existing Precedent.

1. <u>There Is No "Prohibition" or "Effective Prohibition."</u>

Under existing precedent, Level 3 has failed to show that the rents NYSTA charges for expansions in the rights-of-way "have the effect of prohibiting" Level 3's ability to provide service.[17] It is worth remembering that the claim comes a decade after Level 3, through its predecessor agreed to the terms of the Rider, and paid the required fee for six years. One would expect the company to be able to provide clear evidence that it had been prohibited from providing a service. Level 3 does not do so.

The key question is whether the rent payments "materially inhibit[ ] or limit[ ] the ability" of Level 3 "to compete in a fair and balanced legal and regulatory environment." *In re Cal. Payphone Ass'n*, 12 FCC Rcd. 14,191, 14,206 ¶ 31 (1997). As this Commission explained in *Cal. Payphone*, this requires more than showing that the company cannot place its facilities where it wants to place them, or that it will incur additional costs in entering the market. To

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[16] Theoretically, the Commission could decide whether there is a prohibition under Section 253(a) and then leave the question of whether the Rider may be preempted to a court. The more prudent course is to allow a court to resolve the entire matter.

[17] Level 3 admits that the rents charged by NYSTA do not literally "prohibit" the ability to provide service. Petition at 30. Thus, the only question is whether the rents "effectively prohibit" the ability to provide service.

show a material inhibition, it is necessary for Level 3 show that the NYSTA actions make its provision of service "impractical and uneconomic." *Id.* at ¶ 41; *see also, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999) (finding the word "impair" in Sec. 252 requires more than a showing of an increase in costs). While Level 3 maintains that the rents "increas[e] the costs of providing telecommunications services to many communities throughout New York State to the point that Level 3 will not enter those markets," Petition at 30, Level 3 never actually makes the critical showing that the rents effectively prohibit its ability to provide any service.

First, a successful Section 253 claim cannot be based on an "effective prohibition" in the abstract. As such, the FCC has framed its Section 253 analyses around particular "service market and geographic market[s]." *Cal. Payphone*, 12 FCC Rcd. at 14,210 ¶ 27. Yet, Level 3 largely fails to provide this critical context for its Petition. For example, Level 3 challenges its current rent payments for existing regeneration facilities and POPs, but it does not establish the markets it serves with these existing facilities, or discuss how these rental payments inhibit its ability to compete. To the contrary, Level 3 states that it "offers . . . telecommunications services to many customers along the Backbone Network." Petition at 33. Level 3 also claims that the rental costs for *additional* regeneration facilities and POPs prohibit it from building out to "other communities." Petition at 30, 33. Level 3 names Amsterdam, Petition at 33, but does not otherwise establish the relevant markets that are at issue.

Second, Level 3 fails to establish that to provide service in this market would be "impractical and uneconomic." *Id.* at ¶ 41. This is particularly true when one recognizes that the practicality and economy of serving the market must be gauged by looking at the entire arrangement between the parties, not just the Rider, particularly since the documents were negotiated nearly contemporaneously. Moreover, Level 3 never shows that it would have been "impractical or uneconomical" to use the exit points it agreed to in 1999, or to use other rights of way -- a showing the Commission considered critical in *California Payphone.*[18] Here, publicly available data suggest at least two rights-of-way ran parallel to the NYSTA's property.[19]

Third, even if the Thruway presented the only means to serve the relevant markets, Level 3 fails to provide evidence showing that NYSTA's rent requirements "materially inhibit" its ability to compete there. Level 3 cannot even show that it is currently ready to compete in Amsterdam and other communities *but for* NYSTA's rental terms. Instead, Level 3 only posits that *if* the company had sought federal stimulus funding (it did not), and *if* the company had obtained such funding, projects in these communities could be feasible absent the NYSTA rental requirement. Petition at 25. This hardly amounts to a showing that NYSTA's rents make it "impractical and uneconomic" to operate in the market. It is more of an admission that Level 3 could not enter the market even if the rents disappeared. Moreover, Level 3 focuses *only* on the rental fees NYSTA charges for Level 3 *to expand* its occupation of the rights-of-way; Level 3 ignores the total price it pays for occupation of over 500 miles of NYSTA property and facilities. Level 3 does not contend that the agreement, considered in toto, is prohibitory. A plaintiff cannot bring a Section 253 claim by dissecting a complicated arrangement into components, and then arguing that one portion, considered in isolation, is prohibitory.

Perhaps recognizing that its factual case is weak, Level 3 argues that the Commission should decide whether the fee is prohibitory by asking whether it would be prohibitory if adopted

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[18] Level 3's other evidence is, at best, speculative. Level 3 claims that it colored locations within the NYSTA rights-of-way red "due to a variety of factors, prominently including NYSTA's rent demands and the difficulty of dealing with NYSTA." Petition at 21. This is hardly dispositive. Level 3 also claims that the rents due "result in nearly a fifty percent increase in operating costs for a potential Amsterdam build-out." Petition at 33. This may mean that the market was less profitable for Level 3, but it does not show that the contractual terms made it uneconomic to enter the market.

[19] *See, e.g.,* https://www.nysdot.gov/divisions/operating/opdm/passenger-rail/passenger-rail-repository/nys_railmap.pdf, http://graphics8.nytimes.com/images/blogs/greeninc/mapp2.jpg.

in every market. This "hypothetical" bears no conceivable relation to reality. It depends on the assumption that what one charges in New York, New York is prohibitory if the charge would be prohibitory in Baggs, Wyoming. But Section 253 does not ask whether a provision would be unlawful in a hypothetical case; it asks whether a requirement is prohibitory in a given market. *Level 3 Commc'ns v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007).

Level 3 claims that *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006), requires the Commission to consider the effect if the NYSTA fees were adopted in every market. That is a misstatement of the case. The First Circuit did not decide that in a challenge to Guayanilla's requirements, it was appropriate to assess the "effect" of other municipalities' requirements. Instead, the court merely found it appropriate to consider Puerto Rico-wide information so that it could calculate the impact in Guayanilla itself, for which little data was available. *Id.* at 17-19 (finding "it is reasonable to conclude that that the effect of Ordinance No. 40 on the profitability of its operations *within the Municipality* would be similarly, or perhaps even more, substantial.") (emphasis added). The focus of the Section 253 analysis appropriately remained the particular market at issue.[20]

C. The Safe Harbor in Section 253(c) Would Apply.

As noted, the FCC should not address Section 253(c). But we note certain principles that would likely lead a court to conclude that the fees are protected by this statutory safe harbor.

A state or local government's fees for right-of-way use need not be limited to costs. Level 3 appears to recognize this. Petition at 39 (noting that the fees "bear no relationship to the use of the rights-of-way, the costs imposed on NYSTA, the value they provide to Level 3,

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[20] Note that in *Guayanilla*, the court decided that the fee would be prohibitory in the more profitable market; and therefore inferred that the fee would be prohibitory in the less profitable market, for which no data was available. Here, Level 3 appears to ask the Commission to consider what the effect of the charge would be in smaller markets, and based on that analysis, to infer that the fee is too high in the nation's third largest state.

prevailing market rates, or any other plausible measure of a fair and reasonable fee") (emphasis added). Indeed, Section 253(c) does not mandate any particular model to calculate "fair and reasonable" compensation; different models will be appropriate depending on the situation.

One key indicator that a fee is fair and reasonable is that participants in the market have been willing to pay it. Here, it is critical that Level 3 (through its predecessor) and others have paid the rental fees for years. *Qwest Corp. v. City of Santa Fe,* 380 F.3d 1258, 1272 (10th Cir. 2004) (citing *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000)) (considering factors including the "amount other telecommunications providers would be willing to pay"). While *Guayanilla* questioned the use of these factors in the case before it,[21] 450 F.3d at 22-23, the court proceeded to note that the challenged municipality could not "point to any telecommunications providers who have been willing to pay the requested fee." *Id.* at 23. While the fact an entity has agreed to pay a fee may not always be depositive, it is surely significant and sufficient in situations where the fee is longstanding and (as in this case) part of a contract that provides significant benefits.

D. If the FCC Chooses To Reach the Merits, a Hearing Will Be Necessary.

As the above discussion makes clear, if the Commission were to reach the merits, a full hearing would be necessary. The case raises complex factual and economic questions. Discovery might be necessary to test Level 3's Section 253(a) claims by considering: (a) whether alternative avenues were available to serve the markets in question; (b) whether these markets are open to telecommunications providers generally; and (c) whether the rental requirements materially inhibited Level 3's ability to serve any telecommunication service. But the best course here is for the Commission to dismiss, because Level 3 (and others), acting in the free market, agreed to the very rental terms that it now claims are prohibitory.

[21] The case involved imposition of a new fee, not a challenge to a longstanding, negotiated fee.

III. CONCLUSION

For the reasons indicated, the FCC should deny the Petition.

Respectfully submitted,

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October 15, 2009

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Comments, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

October 15, 2009

Joseph Van Eaton

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